Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

ALBERT J. WOJCIK and RODNEY WALKER,

Petitioners,

v.

DONALD L. MEEK,

Respondent.

On Petition For Writ Of Certiorari To United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When a judge decides who will serve as his or her subordinate judicial officer and adjudicate cases on the judge's behalf, does the judge act in

> a *judicial* capacity, *Mireles v. Waco*, 502 U.S. 9 (1991), and therefore, to promote judicial independence, enjoy absolute immunity from suit for alleged violation of civil rights in making that decision,
>
> or
>
> an *administrative* capacity, *Forrester v. White*, 484 U.S. 219 (1988), and therefore expose himself or herself to such chilling, collateral litigation?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is set out in the Appendix to this Petition at Appendix ("App.") 1 and is reported at 183 F.3d 962.

The opinion of the United States District Court for the Central District of California is set out in the Appendix to this Petition at App. 16 and is reported at 982 F. Supp. 1410.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit decided this case on June 24, 1999. No petition for rehearing was filed.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The full text of California Constitution, article VI, section 22, authorizing judges to appoint commissioners,

California Code of Civil Procedure section 259 and California Government Code sections 72190, 72190.1, and 72190.2, relating to the adjudicatory powers of a municipal court commissioner, and California Government Code section 72192, relating to the service of a commissioner "at the pleasure of a majority of the judges" of the municipal court, is set out in the Appendix to this Petition beginning at App. 38.

STATEMENT OF THE CASE

A. The Alleged Civil Rights Violation: Defendant Judges' Discharge Of Plaintiff Court Commissioner, A Subordinate Judicial Officer, For Political Reasons.

According to his complaint, plaintiff Donald L. Meek was a Commissioner of Municipal Court of the County of Riverside, California. (Clerk's Record ["C.R."] 1, ¶ 3.)

Under California law, Commissioners are authorized to act on behalf of the court as temporary judges, to hear and report findings to the court, to adjudicate uncontested actions, to adjudicate actions involving infractions and small claims, to conduct arraignments, and to issue warrants. Cal. Code Civ. Proc. § 259 (West 1982); Cal. Gov't Code §§ 72190, 72190.1, and 72190.2 (West Supp. 1997). Commissioners serve "at the pleasure" of a majority of the judges of the court. Cal. Gov't Code § 72192 (West Supp. 1997).

Plaintiff ran for election as a judge of the Court. Another Commissioner, defendant Albert J. Wojcik, also

ran for that judgeship. Plaintiff alleges that a judge of the court, defendant Rodney Walker, said he considered plaintiff his political enemy and would fire plaintiff as a commissioner if plaintiff did not win the election. (C.R. 1, ¶ 13.)

Defendant Wojcik defeated plaintiff in the judicial election. (C.R. 1, ¶¶ 6, 14.) About three weeks before defendant Wojcik took his seat on the court, he, defendant Walker and another judge, Curtis Hinman, met and voted on plaintiff's termination as a commissioner. Defendants voted for termination; Hinman abstained. (C.R. 1, ¶ 15.)

Hinman told plaintiff to resign or he would be fired because of plaintiff's unethical conduct during his election campaign. (C.R. 1, ¶ 16.) Hinman also said plaintiff could have a hearing before defendants Walker and Wojcik; "however, it would do no good, because the outcome would be the same." (C.R. 1, ¶¶ 18, 19.) In lieu of termination or resignation, plaintiff retired as a Commissioner. (C.R. 1, ¶ 17.)

B. Plaintiff's Civil Rights Action.

Plaintiff sued defendants for violation of his civil rights under 42 U.S.C. § 1983. (C.R. 1.) Plaintiff alleged he was constructively discharged, and that his discharge for ethical violations was a pretext for defendants' true motive of retaliation for plaintiff's exercise of his First Amendment right to run and campaign for office. (C.R. 1, ¶¶ 20, 24, 25.) He seeks special, general and punitive damages from defendants personally. (C.R. 1, ¶¶ 27, 28.)

C. Defendants' Assertion Of Their Absolute Judicial Immunity.

Defendants moved to dismiss plaintiff's complaint for failure to state grounds upon which relief could be granted. Fed. R. Civ. P. 12(b)(6). They asserted they were absolutely immune from civil rights liability for plaintiff's alleged constructive discharge as a Court Commissioner because the selection of subordinate judicial officers such as Court Commissioners is an inherently judicial function, *Mireles v. Waco*, 502 U.S. 9, 9-10, 112 S. Ct. 286, 116 L. Ed. 2d 9 (1991) ("*Mireles*"). (C.R. 4.)[1]

D. The District Court's Decision Rejecting Judicial Immunity.

The district court denied defendants' motion to dismiss. (App. 16.) The court ruled, among other things, that the defendant judges did not have judicial immunity because their alleged acts were, in the court's view, administrative rather than judicial, citing *Forrester v. White*, 484 U.S. 219, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988) ("*Forrester*"). (App. 23-29.)

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[1] Plaintiff also sued the County of Riverside, California. The district court granted the County's motion to dismiss. (App. 21-22.) Plaintiff has not contested that ruling.

E. The Published Ninth Circuit Decision Affirming The Denial Of Judicial Immunity.

Defendants appealed,[2] but the Ninth Circuit Court of Appeals affirmed in a 2-1 decision. The majority ruled that "appellants were not entitled to judicial immunity because the challenged action, their decision to constructively terminate Meek, was an administrative rather than a judicial act." Relying on *Forrester*, the Ninth Circuit stated:

> A state court judge is generally not entitled to absolute immunity from liability arising out of a decision to fire a subordinate judicial employee because the decision is not a judicial or adjudicative act, but rather an administrative one. (App. 6.)

The Ninth Circuit rejected defendants' argument that due to the adjudicative duties of a court commissioner, a judge's decision to hire or fire a commissioner is an inherently judicial function. The court could find no reported case "in which a court evaluated the nature of the services provided by a fired employee to determine whether the decision to terminate was judicial." (App. 7.) Unwilling to undertake a functional evaluation, the Ninth Circuit instead adopted the district court's formalistic approach for its conclusion that the defendants acted in their administrative rather than judicial capacity:

> First, the decision to terminate plaintiff was an administrative decision, rather than a judicial

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[2] The order denying an immunity defense is appealable as a matter of right. *Nixon v. Fitzgerald*, 457 U.S. 731, 741-43, 102 S. Ct. 2690, 2697, 73 L. Ed. 2d 349 (1982).

act, because it involved the termination of an employee, and not a decision in a matter pending before the court. Second, although it is unclear whether the vote to terminate plaintiff took place in a judge's chambers, it did not occur while the court was in session. Third, the controversy centered, not on a case, but on plaintiff's efforts to seek the same judicial office as then-Commissioner Wojcik in the April, 1996 election. Finally, according to the allegations of the complaint, the decision to terminate plaintiff was a response to his campaign for judicial office and had nothing to do with plaintiff's performance or decision in a particular case. (App. 10.)

REASONS FOR GRANTING THE PETITION

WHETHER A JUDGE'S CHOICE OF A SUBORDINATE JUDICIAL OFFICER TO ADJUDICATE MATTERS ON THE JUDGE'S BEHALF IS A *JUDICIAL* FUNCTION – AFFORDING THE JUDGE ABSOLUTE IMMUNITY FROM CIVIL RIGHTS LIABILITY – OR AN *ADMINISTRATIVE* FUNCTION – SUBJECTING THE JUDGE TO COLLATERAL LITIGATION – IS AN ISSUE OF FIRST IMPRESSION FOR THIS COURT AND OF CRITICAL IMPORTANCE TO THE OPERATION OF ALL OUR NATION'S COURTS.

I. ABSOLUTE IMMUNITY FROM COLLATERAL LITIGATION OVER JUDICIAL CONDUCT IS THE BEDROCK OF AN INDEPENDENT JUDICIARY.

Since mediaeval times, the law has afforded judges absolute immunity from suit over their conduct as judicial officers. *Mireles*, 502 U.S. at 9-10. In particular, judges

are absolutely immune from civil rights liability under 42 U.S.C. § 1983 arising from exercise of their judicial functions, even if the judges allegedly act in excess of jurisdiction and out of malice or ulterior motive. *Stump v. Sparkman*, 435 U.S. 349, 356-57, 98 S. Ct. 1099, 1105, 55 L. Ed. 2d 331 (1978).

Judicial immunity, like similar immunities for legislators and prosecutors, promotes uninhibited, independent decision-making. *Clinton v. Jones*, 520 U.S. 681, 692-93, 117 S. Ct. 1636, 1643, 137 L. Ed. 2d 945 (1997). It frees the judge "to act upon his own convictions without apprehension of personal consequences to himself." *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1871). "[T]he essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." *Mitchell v. Forsyth*, 472 U.S. 511, 525, 105 S. Ct. 2806, 2815, 86 L. Ed. 2d 411 (1985). The risk of occasional abuse of power is outweighed by the benefits of fearless decision-making. As this Court explains in *Ferri v. Ackerman*, 444 U.S. 193, 202-04, 100 S. Ct. 402, 408-09, 62 L. Ed. 2d 355 (1979):

> As public servants, the prosecutor and the judge represent the interest of society as a whole. The conduct of their official duties may adversely affect a wide variety of different individuals, each of whom may be a potential source of future controversy. The societal interest in providing such public officials with the maximum ability to deal fearlessly and impartially with the public at large has long been recognized as an acceptable justification for official immunity. The point of immunity for such officials is to forestall an atmosphere of intimidation that

would conflict with their resolve to perform their designated functions in a principled fashion.

The issue in this case is whether the defendant judges' alleged politically-motivated decision to discharge their court commissioner was administrative or judicial. As we shall explain, this is a novel and important issue of concern to all courts and judges, with implications far beyond the selection of commissioners. In concluding that the judges' decision in this case was administrative rather than judicial, the Ninth Circuit erroneously frustrates the purpose of judicial immunity, undermines the freedom of all judges to adjudicate cases and administer justice in accordance with their independent view of the law, muddies the waters of judicial immunity jurisprudence, and opens the door to unwarranted litigation against appellate as well as trial judges.

II. CONTRARY TO THE NINTH CIRCUIT'S CONCLUSION, A JUDGE'S CHOICE OF A SUBORDINATE JUDICIAL OFFICER TO ADJUDICATE MATTERS FOR THE JUDGE IS A TRADITIONAL JUDICIAL FUNCTION THAT SHOULD ENJOY JUDICIAL IMMUNITY.

A judge's selection of subordinate judicial officers is, by tradition and function, a judicial act. In classifying it as a mere administrative act for purposes of judicial immunity, the Ninth Circuit forsakes a functional approach and resorts to mere matters of form; the court focuses entirely on the circumstances that the conduct also involves the termination of an employee, does not occur while the court was in session, and does not center

on a particular case. (App. 10.) In placing form ahead of substance, the Ninth Circuit's approach threatens to undermine judicial immunity and to sharply curtail all judges' freedom to decide how their cases should be adjudicated.

A. Whether Conduct Is Judicial Or Administrative Should Depend On Whether The Conduct Serves A Judicial Function, Not On Whether The Conduct Happens To Occur On The Bench During Trial.

As this Court has held, judicial immunity "is justified and defined by the *functions* it protects." *Forrester*, 484 U.S. at 227, original emphasis. In *Forrester*, the Court found that a judge acted in an administrative rather than judicial capacity when he fired a probation officer from the court's staff. The Ninth Circuit purported to apply *Forrester* to this case, but in fact it applied only superficial factual similarities rather than fundamental legal principles. There is a critical and qualitative difference between the selection of court administrative personnel such as probation officers or court clerks, who provide vital but routine assistance to the court, and the selection of subordinate judicial officers, who actually adjudicate matters on the court's behalf. Adjudicating cases is an inherently judicial act, and in deciding *who* will adjudicate their cases for them, judges are deciding *how* their cases will be adjudicated for them.

Even the Ninth Circuit acknowledges that selection of a subordinate judicial officer in a particular case is a judicial function. *New Alaska Dev. Corp. v. Guetschow*, 869

F.2d 1298, 1302 (9th Cir. 1989) (appointment of receiver). If selection of a subordinate judicial officer to adjudicate a *particular* matter is a judicial function, selection of a subordinate judicial officer to adjudicate *all* such matters must be a judicial function, too.

Contrary to the Ninth Circuit's analysis in the present case, other circuits have recognized that "the applicability of judicial immunity is not limited to acts which occur within the confines of the courtroom, and consequently, acts performed outside of the courtroom are not, *ipso facto*, non-judicial acts." *Barrett v. Harrington*, 130 F.3d 246, 260 (6th Cir. 1997). Judges enjoy absolute immunity for a variety of judicial functions that do not involve decision-making in a particular case.

In *Barrett*, a judge instigated a criminal investigation against a disgruntled litigant. The Sixth Circuit found the judge enjoyed absolute judicial immunity for this conduct because an act "taken to protect the integrity of the judicial system, is a 'judicial act' and therefore entitled to absolute judicial immunity." *Id.* at 257. Rejecting the courtroom litmus-test adopted by the Ninth Circuit, the *Barrett* court applies the functional approach:

> In this case, Judge Harrington's letters to prosecutors did not concern whether Mr. Barrett would win or lose the case. However, the letters did involve the 'case deciding process,' as the Judge wrote to express her fear that the harassment would cause her to have to recuse herself from future cases involving Mr. Barrett – recusal is undoubtedly an act that concerns judicial decision-making. *Id.* at 258.

In *Fields v. Soloff*, 920 F.2d 1114 (2d Cir. 1990), the court applied judicial immunity to a judge's limitation of a grand juror's free speech rights. There was no case pending before the court, but supervision of the grand jury is a traditional judicial function.

Similarly, when a judge decides on the qualifications of attorneys applying for admission to the bar of the judge's court, the judge is not deciding a particular case, but rather deciding how all cases will be conducted in the judge's court. This is an inherently judicial function for which the judge enjoys absolute immunity. As *Sparks v. Character and Fitness Comm. of Ky.*, 859 F.2d 428, 434 (6th Cir. 1988) explains:

> Some functions performed by courts are so inherently related to the essential functioning of the courts as to be traditionally regarded as judicial acts. Determining the composition of the bar is just such an historic and traditional function. The establishment of criteria for determining the intellectual competence, academic preparedness, and moral fitness of persons who petition the court for the privilege of undertaking the confidential trust of serving the court as one of its professional officers has always been a function confined to the courts themselves. It has been universally thought that the courts are best equipped to understand the requirements for adequate representation of lay persons before the courts and to identify the qualifications of those who would undertake such representation as the courts' officers. That inherent expertise, and the exercise of the power to apply it in admitting and rejecting candidates to the practice of law, functions rooted in tradition and

> history, are arguably as fundamental to the sound functioning of the judiciary as is the task of resolving the disputes such officers present.[3]

In short, the classification of conduct as judicial or administrative for purposes of judicial immunity ought to depend on the function served by the judge's conduct, not, as the Ninth Circuit would have it, simply on such formalistic factors as whether the conduct occurred in the courtroom or entailed an employment decision.

B. Selection Of Subordinate Judicial Officers To Adjudicate Cases On The Court's Behalf Serves A Core Judicial Function.

California judges, like judges in many states, in all federal district courts, and even some federal appellate

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[3] In discussing the court's authority to appoint independent counsel, this Court explained in *Morrison v. Olson*, 487 U.S. 654, 681 n.20, 108 S. Ct. 2597, 2614 n.20, 101 L. Ed. 2d 569 (1988): "By way of comparison, we also note that federal courts and judges have long performed a variety of functions that, like the functions involved here, do not necessarily or directly involve adversarial proceedings within a trial or appellate court. For example, federal courts have traditionally supervised grand juries and assisted in their 'investigative function' by, if necessary, compelling the testimony of witnesses. [Citation.] Federal courts also participate in the issuance of search warrants, [citation], and review applications for wiretaps, [citations], both of which may require a court to consider the nature and scope of criminal investigations on the basis of evidence or affidavits submitted in an ex parte proceeding. . . . [F]ederal courts possess inherent authority to initiate contempt proceedings for disobedience to their orders, and this authority necessarily includes the ability to appoint a private attorney to prosecute the contempt."

courts, have the authority to select subordinate judicial officers – usually called commissioners, magistrates or referees – to assist them in deciding, or even to assume the duty of deciding, cases that come before their courts.[4]

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[4] Federal district judges appoint magistrate judges pursuant to 28 U.S.C. § 631. The Ninth Circuit itself has an Appellate Commissioner, appointed by the Court to adjudicate certain matters, including dispositive motions. *See* 9th Cir. R. 27-1(1) advisory committee's note. A non-exclusive list of states that authorize judicial appointment of subordinate officers includes: Alaska Statutes, § 22.15.170(c) ("The presiding judge of the superior court in each judicial district shall appoint the magistrates for the district court for the judicial district."); Arkansas Statutes, § 16-17-107 (municipal court judges appoint magistrates as "judicial officers"); Indiana Code, §§ 33-5-40-73 (court appoints two magistrates), 33-4-7 ("Not more than one (1) of the magistrates may be a member of the same political party."); Kentucky Const., § 113 ("In any county in which no district judge resides the chief judge of the district shall appoint a trial commissioner who shall be a resident of such county and who shall be an attorney if one is qualified and available.") North Dakota Sup. Ct. Admin. R. 20, § 4 ("The presiding judge of the judicial district may appoint a magistrate. . . . "); Ohio Civ. R. 53(A) ("A court of record may appoint one or more magistrates who shall be attorneys at law admitted to practice in Ohio."); Oklahoma Statutes, § 10-7003.8.6(A) ("Any judge who is assigned to hear juvenile cases . . . may appoint a suitable person or persons to act as referee or referees. . . . "); Oregon Revised Statutes, § 419A.150 ("The judge of the juvenile court may appoint one or more persons as referee of the juvenile court. . . . "); Rhode Island General Laws, § 8-10-3.1(a) ("The court may appoint magistrates to assist the court in the conduct of its business."); Revised Code of Washington, § 2.23.010 ("There may be appointed in each county or judicial district, by the judges of the superior court having jurisdiction therein, one or more court commissioners for said county or judicial district."); Wisconsin Statutes, § 755.19(1) ("The presiding judge of the municipal court shall be the appointing authority. . . . ").

Under California law, a commissioner is deemed a subordinate judicial officer, Cal. Const. art. VI, § 22, Cal. Gov't Code §§ 72190, 72701 (West Supp. 1997), and performs many adjudicatory functions normally performed by judges. *Franceschi v. Schwartz*, 57 F.3d 828 (9th Cir. 1995). Commissioners are authorized, among other things, to act as temporary judges, to hear and report findings to the court, to determine all uncontested actions, to determine actions involving infractions and small claims, to conduct arraignments, and to issue warrants. Cal. Code Civ. Proc. § 259; Cal. Gov't Code §§ 72190, 72190.1, and 72190.2. Thus, in many instances commissioners actually make judicial decisions for their appointing judges and in others they take proof and make findings upon which the appointing judges base their judicial decisions.

Under California law, commissioners, like commissioners, magistrates and referees in many states, serve "at the pleasure" of a majority of the judges of the court. Cal. Gov't Code § 72192 (West Supp. 1997).[5] This legislation

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[5] For example, Alaska Statutes, § 22.15.170(c) ("Each magistrate serves at the pleasure of the presiding judge of the superior court in the judicial district for which appointed."); Indiana Code, § 33-4-7 ("Not more than one (1) of the magistrates may be a member of the same political party."); North Dakota Sup. Ct. Admin. R. 20, § 4 (" . . . to serve at the pleasure of the presiding judge."); Oklahoma Statutes, § 10-7003.8.6(A) (" . . . to hold office at the pleasure of the judge."); Oregon Revised Statutes, § 419A.150 ("A person appointed referee shall . . . hold office as such at the pleasure of the judge."); Rhode Island General Laws, § 8-10-3.1(c) ("The magistrate shall serve at the pleasure of the chief judge. . . . "); Revised Code of Washington, § 2.24.010 ("Each such commissioner shall . . . hold the office during the pleasure of the

acknowledges the necessary judicial discretion inherent in the selection of subordinate judicial officers. Even in jurisdictions where subordinate judicial officers serve for specified terms,[6] their judges still retain the authority not to reappoint them at the end of their terms.[7]

Subordinate judicial officers represent the judges and act for them, typically in matters that most closely and significantly impact the lives of average citizens, such as juvenile, family, criminal and probate proceedings. They hold significant policymaking positions, especially in their role as temporary judges for the court. As *Kurowski v. Krajewski*, 848 F.2d 767, 770 (7th Cir. 1988) explains:

> A judge both makes and implements governmental policy. A judge may be suspicious of the police or sympathetic to them, stern or lenient in sentencing, and political debates rage about such questions. In most states judges are elected, implying that the office has a political

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judges making the appointment."); Wisconsin Statutes, § 755.19(1) ("The presiding judge of the municipal court shall be the appointing authority and may terminate the employment of a municipal court commissioner at will and without cause."); Wyoming Statutes, § 5-3-301 ("District court commissioners shall hold office during the pleasure of the district court, and may be summarily removed.").

[6] For example, 28 U.S.C. § 631(i).

[7] The Ninth Circuit cites *Richardson v. Koshiba*, 693 F.2d 911 (9th Cir. 1982) for the proposition that the "act of appointing state judges involves an executive not a judicial act." App. 9 n.2. *Richardson* involved an action against members of the State Judicial Selection Commission, not judges. The court assumed that if the appointment had been made by a judge, rather than the Commission, the judge would have been immune. 693 F.2d at 914 n.10.

> component. Holders of the appointing authority may seek to ensure that judges agree with them on important jurisprudential questions. . . . What is true about the office of judge is true about the office of judge *pro tempore*.[8]

Even when commissioners act only in an advisory role, their advice carries great weight with the judges. In the similar context of the use of special masters as fact-finders, this Court has acknowledged that it "regularly acts on the basis of the master's report and exceptions thereto." *United States v. Raddatz*, 447 U.S. 667, 683 n.11, 100 S. Ct. 2406, 2416 n.11, 65 L. Ed. 2d 424 (1980).

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[8] For this reason, the appointment of judges is deemed an inherently political function not subject to First Amendment restrictions. *Newman v. Voinovich*, 986 F.2d 159, 163 (6th Cir. 1993) ("Governor Voinovich is free to make judicial appointments based on political considerations."). In this regard, political loyalty is a valid justification for selecting and dismissing such policymaking appointees. *Green v. Henley*, 924 F.2d 185, 187 (10th Cir. 1991); *Fazio v. City and County of San Francisco*, 125 F.3d 1328, 1331 (9th Cir. 1997) ("a public official who is a 'policymaker' may be fired for political reasons without offending the United States Constitution").

Although California judicial positions are supposed to be "nonpartisan," judges and commissioners are policymakers. The mere fact that judges are elected highlights the political component of their job. *Kurowski v. Krajewski*, 848 F.2d at 770 (7th Cir. 1988). Indeed, under California law, political parties may endorse, support, or oppose candidates for "nonpartisan" offices. *Unger v. Superior Court*, 37 Cal. 3d 612, 615, 209 Cal. Rptr. 474, 475, 692 P.2d 238, 239 (1984). Judges are not automatons, applying strict rules to given sets of facts. They must decide what the facts are and choose among competing legal policies and principles to reach a just result in each case. Their political views on the law and how it should be administered necessarily color their decisions.

The judges' choice of commissioners is therefore sensitive and personal and, ideally, reflects the judges' own judicial philosophies and decision-making styles. Loyalty, trust, confidence and philosophical affinity are entirely legitimate considerations in the selection of a subordinate judicial officer. Other circuits acknowledge this. In *Mumford v. Basinski*, 105 F.3d 264 (6th Cir. 1997), the administrative judge of an Ohio domestic relations court replaced the court's chief referee after the referee supported the judge's unsuccessful opponent for election to the judge's seat. The Sixth Circuit upheld dismissal of the referee's civil rights claim because the referee was a policymaker in whom the judge must have complete trust and confidence. *Id.* at 271. The court explained:

> The effective performance of a subordinate 'political' public office requires that the employee and supervisor maintain a viable working relationship, which includes confidence by the supervisor in the employee's political credentials and philosophy, as well as his intellectual and technical abilities. *Id.*

The Sixth Circuit's reasoning is fully applicable here:

> Unquestionably, the inherent duties of an Ohio domestic relations court referee entail a relationship of confidence between the referee and the judge(s) which he serves. The referee is privy to confidential litigation materials and internal court communications in the discharge of his duties, and further maintains a personal relationship with the judge(s) which he serves. [Citations.] Moreover, the referee effectively makes policy for, or suggests policy to, the court on each occasion that he resolves a dispute in the court's name or recommends a disposition

> to the judge. Consequently, his supervising judge must be convinced that the judgment capabilities of the referee, and the confidential relationships that arise as a result of the intimate judicial and quasi-judicial discussions, are unquestionable. The referee's political ideology, associations, and activities may rationally influence a judge's assessment of an individual's suitability for a position as his referee. *Id.* at 272.[9]

As a municipal court commissioner, plaintiff held a position of trust and confidence with the judges of the municipal court. Plaintiff effectively made public policy for the court and exercised delegated judicial authority in resolving disputes, issuing warrants, conducting arraignments, and the like, on the court's behalf. As a matter of sound public policy, the judges for whom he acts, and with whom he must work, should be entitled to choose a subordinate judicial officer in whom they have absolute confidence and with whom they share political affinity. They should not be forced to retain a commissioner who has attempted to prevent one of them from being a judge. As Judge Posner aptly put it in *Wilbur v. Mahan*, 3 F.3d 214 (7th Cir. 1993):

> A public agency would be unmanageable if its head had to appoint or retain his political enemies. . . . *Id.* at 217.

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[9] *See also Brazil-Breashears v. Bilandic*, 53 F.3d 789 (7th Cir. 1995), where an appellate court staff attorney ran for election to a trial court position. This violated the appellate court's policy against court employees publicly engaging in election campaigns, so the attorney was discharged. The Seventh Circuit upheld the discharge: "Time and again, the Supreme Court and lower federal courts have upheld similar restrictions on the political activity of state employees." *Id.* at 791.

> If a public official is permitted to fire a confidential or policymaking employee merely because the latter quietly, inoffensively, undemonstratively belongs to the wrong political party . . . the official should be permitted to fire the same employee when he latter asks the electorate to throw the rascal out and put himself into the rascal's office. *Id.* at 218.

To maintain the unfettered independence we expect from our courts, judges cannot be bound to choose or keep any particular person as their judicial surrogate. That is why, unlike the judge's decision to replace a probation officer in *Forrester*, the defendants' decision to replace their commissioner truly was a judicial act, not a mere administrative act "that simply happen[s] to have been done by judges." 484 U.S. at 227. And that is why the process for selecting commissioners necessarily should remain immune from attack under Section 1983 by disappointed office-seekers such as plaintiff. The selection of subordinate judicial officers, as occurred in this case, is a judicial function "rooted in tradition and history" and "fundamental to the sound functioning of the judiciary." *Sparks v. Character and Fitness Comm., supra,* 859 F.2d 428, 434. The Ninth Circuit's contrary decision makes bad public policy and adopts a formalistic approach that flies in the face of the functional approach to judicial immunity that this Court and other circuits have adopted.[10]

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[10] The district court found that even if defendants engaged in a judicial function, they acted "in complete absence of jurisdiction." (App. 29.) The court relied on the fact that at the time of the alleged constructive discharge defendant Wojcik had not yet taken his oath of office and that the two defendants had

Moreover, as we next explain, unless the Ninth Circuit's formalistic approach is rejected, it could get even worse.

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no authority to discharge plaintiff since by law plaintiff served at the pleasure of a majority of a dozen municipal court judges.

The district court was wrong about this, too. Judges do not act in complete absence of jurisdiction, "even if [their] exercise of authority [was] flawed by the commission of grave procedural errors." *Stump v. Sparkman*, 435 U.S. at 359. By claiming that the defendants constructively discharged him – that he reasonably believed defendants had the authority to discharge him – plaintiff necessarily concedes defendants were acting within their jurisdiction.

Moreover, even if defendants had actually discharged plaintiff and had failed to follow proper procedures, they still would not have acted "in the complete absence of all jurisdiction." That phrase means much more than just "in excess of jurisdiction." *King v. Myers*, 973 F.2d 354, 358 (4th Cir. 1992) ("[The magistrate's] actions were judicial in that, while she may have exceeded her authority in the manner in which she ordered the arrest, she performed a function 'normally performed by a judge.' "). As we have shown, selection of subordinate judicial officers is a function "normally performed by a judge." However misguided defendants' alleged conduct was, in deciding who they wanted as their commissioner, they were doing what judges do.

The fact that defendant Wojcik had not yet formally taken office as judge is immaterial. *White by Swafford v. Gerbitz*, 892 F.2d 457, 462 (6th Cir. 1989) (defects in seating of judge does not deprive judge of all jurisdiction). He was acting as a judge-elect, not as a private citizen. *See Mumford v. Basinski*, 105 F.3d at 266, where the defendant judge-elect wrote to the plaintiff domestic relations referee that he would be terminated immediately upon the judge assuming office. Judicial immunity applied there, just as it should apply here.

III. THE NINTH CIRCUIT'S DECISION HAS BROAD, ADVERSE IMPLICATIONS FOR ALL TRIAL AND APPELLATE JUDGES.

As we have shown, a judge ought to be free to select and discharge subordinate judicial officers without the chilling impact of potential federal civil rights litigation influencing his or her decision. A judge should not be required to work beside, share confidential matters with, and have his or her cases adjudicated by a subordinate who is not attuned to the judge's judicial philosophy or, as in this case, has attempted to prevent the judge from occupying his or her judgeship.

The Ninth Circuit's rejection of judicial immunity in these circumstances has far-reaching implications. It is an open invitation for virtually any disgruntled rejected applicant for a federal magistrate judge position or similar state magistrate or commissioner position to file suit against those judges responsible for making the decision that he or she, for whatever reason, should not exercise the judicial power of the court. Even the barest allegation of discrimination in selection, whether it be based on party affiliation, race, religion, or even judicial philosophy, would, under the Ninth Circuit's decision, be sufficient to state a claim and require each and every judge involved in the decision-making process to, at the very least, participate in discovery and obtain vindication at earliest, if at all, upon motion for summary judgment. The result is an inevitable and substantial entanglement in litigation for making a core judicial decision – delegation of judicial power – the very evil that the doctrine of judicial immunity was designed to avoid.

Moreover, as the facts of this case indicate, these pernicious effects are not limited to initial selection of judicial officers. These very same considerations and their chilling effect on judicial independence will arise any time a decision must be made concerning the continued employment of subordinate judicial officers who, as in California and many other states, serve "at the pleasure" of the court.

The Ninth Circuit's decision makes bad public policy, unnecessarily and harmfully interfering with inherent judicial discretion and core judicial decision-making. Judges must be free to select subordinate judicial officers to represent the judges and adjudicate matters on the judges' behalf. These critical judicial processes should not be constrained by concerns of litigation over subjective selection criteria. Otherwise, our entire judicial system could grind to a halt.

CONCLUSION

America's trial and appellate courts are overwhelmed with work. Indeed, Congress overhauled the federal magistrate system and broadened the magistrates' authority in light of "a multitude of new statutes and regulations [that] had created an avalanche of additional work for the district courts which could be performed only by multiplying the number of judges or giving judges additional assistance." *Mathews v. Weber*, 423 U.S. 261, 268, 96 S. Ct. 549, 553, 46 L. Ed. 2d 483 (1976). Courts could not function effectively without the assistance of loyal, trustworthy subordinate judicial officers such as

commissioners, magistrates, special masters and referees, and without the freedom to assign work as needed. Defendants respectfully urge this Court to review this case and clarify for all courts and litigants whether absolute judicial immunity applies to judges' decisions regarding selection of subordinate judicial officers.

Respectfully submitted,

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APPENDIX

Opinion of the United States Court of Appeals for the Ninth Circuit

Donald L. MEEK, Plaintiff-Appellee,
v.
COUNTY OF RIVERSIDE, Defendant,
and
Albert J. Wojcik, Judge, Riverside Municipal Court;
Rodney Walker, Judge, Riverside Municipal Court,
Defendants-Appellants.

No. 97-56531.

United States Court of Appeals, Ninth Circuit.
Argued and Submitted March 5, 1999.

Filed June 24, 1999.

Before: FERGUSON, BRUNETTI, and T. G. NELSON, Circuit Judges.
Opinion by Judge BRUNETTI; Dissent by Judge FERGUSON.

BRUNETTI, Circuit Judge.

Donald L. Meek brought a section 1983 action against the County of Riverside and two municipal court judges alleging that his First Amendment right to campaign for public office had been violated when he was constructively fired in retaliation for his seeking election to a municipal court judgeship. The defendants moved to dismiss the complaint for failure to state grounds upon which relief can be granted. The district court denied the individually named defendants' motion to dismiss finding that they were not entitled to judicial immunity and that the determination of whether a court commissioner has a First Amendment right not to be fired for political reasons could not be made on the record before it. This

appeal followed. We have jurisdiction over the district court's denial of judicial immunity pursuant to § 28 U.S.C. 1291, and we affirm. Because the denial of the claim that Meek does not have a First Amendment right not to be terminated for political reasons is not a final order, we lack jurisdiction to review the district court's resolution of the issue at this stage of the litigation and therefore dismiss, in part, the appeal.

I.

Meek was appointed a Commissioner of Municipal Court of the County of Riverside, California, in 1989 and, during his tenure, was assigned primarily to the Mt. San Jacinto Judicial District. In September of 1995, Meek learned that two vacancies on the Riverside Municipal Court would occur in March and April of 1996. One of the seats was to be filled by a non-partisan election and the other by a gubernatorial appointment. Meek approached then-Commissioner Albert J. Wojcik about an arrangement whereby Meek would support Wojcik in the March, 1996, non-partisan election for the first vacant seat and Wojcik would support Meek in his efforts to obtain a gubernatorial appointment to the second seat.

Shortly after his meeting with Wojcik, Meek concluded that Wojcik would not support him in his effort to obtain the gubernatorial appointment. He also learned that Municipal Judge Curtis R. Hinman had written a letter to Governor Wilson supporting Sherill Nielsen, a close friend and associate of Municipal Judge Rodney Walker, for appointment to the municipal court. Deciding that he had little chance of obtaining the appointment,

Meek chose to run against Wojcik in the March election. During the campaign, Judge Walker allegedly stated that he would fire Meek from his position of court commissioner if Meek lost the election and that he considered Meek his political enemy.

On March 26, 1996, Wojcik was elected judge of the Mt. San Jacinto Municipal Court and he took office on April 23, 1996. On April 4, 1996, then-Commissioner Wojcik, Judge Walker, and Judge Hinman met and held a vote on whether Meek should be terminated. Wojcik and Walker voted to fire Meek and Judge Hinman abstained.

On April 8, 1996, Judge Hinman informed Meek of the vote to dismiss and told him that he would be fired if he did not resign by April 12, 1996. Judge Hinman informed Meek that he had a right to a hearing before Wojcik and Walker but that "it would do no good, because the outcome would be the same." In lieu of termination or resignation, Meek elected to retire on April 8, 1996. Meek filed a section 1983 suit against Wojcik, Walker, and the County of Riverside claiming that he had been fired in retaliation for exercising his First Amendment right to run and campaign for office. Claiming judicial and political immunity, Wojcik and Walker moved to dismiss the complaint for failure to state grounds upon which relief can be granted.[1] The district court denied Wojcik and Walker's motion to dismiss. The district court found that Wojcik and Walker were not

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[1] The County also moved to dismiss the complaint. The district court granted the County's motion, finding that the County was not responsible for the conduct of municipal court judges. The County is not a party to this appeal.

entitled to judicial immunity because the challenged action was administrative rather than judicial in nature. The district court further found that Wojcik and Walker acted in complete absence of jurisdiction when they constructively fired Meek and that therefore such action was not protected by judicial immunity. The district court also refused to dismiss the complaint on the ground of "absolute political immunity" because it found that it could not resolve on the record before it the issue of whether Meek had a First Amendment right to not be terminated from his position as court commissioner for political reasons.

II.

A. Judicial Immunity

Wojcik and Walker claim that the district court erred in its ruling on absolute judicial immunity. Although a district court's denial of a 12(b)(6) motion generally is not a reviewable final order, the denial of a claim of absolute judicial immunity is immediately appealable under the collateral order doctrine and we review the district court's denial de novo. *Figueroa v. United States*, 7 F.3d 1405, 1408 (9th Cir.1993); *Nixon v. Fitzgerald*, 457 U.S. 731, 741-43, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982). On review, the facts alleged in the complaint are assumed to be true and are construed in the light most favorable to the plaintiff. *Jensen v. Oxnard*, 145 F.3d 1078, 1082 (9th Cir.1998). "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

It is well settled that judges are generally immune from civil liability under section 1983. *Mireles v. Waco*, 502 U.S. 9, 9-10, 112 S.Ct. 286, 116 L.Ed.2d 9 (1991) (citing long line of cases acknowledging that "generally, a judge is immune from a suit for money damages."). "Although unfairness and injustice to a litigant may result on occasion, 'it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself.' " *Id.* at 10, 112 S.Ct. 286 (citing *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347, 20 L.Ed. 646 (1871)). A judge is not deprived of immunity because he takes actions which are in error, are done maliciously, or are in excess of his authority. *Stump v. Sparkman*, 435 U.S. 349, 355-56, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978). The rationale for granting judges immunity from liability for even intentional and malicious conduct while acting in their judicial capacity is that judges should be free to make controversial decisions and act upon their convictions without fear of personal liability. *Id.* at 363-64, 98 S.Ct. 1099. The concern for principled and fearless decision-making forms the basis for judicial immunity. *Pierson v. Ray*, 386 U.S. 547, 554, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967). Absolute judicial immunity, however, is only granted when essential to protect the integrity of the judicial process. *Forrester v. White*, 484 U.S. 219, 224-29, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988) (noting that courts have been hesitant to find or extend absolute official immunity). There are two situations in which judges are not absolutely immune from liability arising out of official conduct. "First, a judge is not immune from

liability for nonjudicial actions, i.e., actions not taken in the judge's judicial capacity. Second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction." Mireles, 502 U.S. at 11-12, 112 S.Ct. 286 (citations omitted); see also, *Schucker v. Rockwood*, 846 F.2d 1202, 1204 (9th Cir.1988) ("A judge loses absolute immunity only when he acts in the clear absence of all jurisdiction or performs an act that is not judicial in nature."); *Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th Cir.1986) (en banc) ("A judge lacks immunity where he acts in the clear absence of all jurisdiction, or performs an act that is not judicial in nature.") (internal quotation marks and citations omitted).

The district court found that appellants were not entitled to judicial immunity because the challenged action, their decision to constructively terminate Meek, was an administrative rather than a judicial act. "[T]he factors determining whether an act by a judge is a 'judicial' one relate to the nature of the act itself, i.e., whether it is a function normally performed by a judge, and to the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity." *Stump*, 435 U.S. at 362, 98 S.Ct. 1099.

A state court judge is generally not entitled to absolute immunity from liability arising out of a decision to fire a subordinate judicial employee because the decision is not a judicial or adjudicative act, but rather an administrative one. Forrester, 484 U.S. at 229, 108 S.Ct. 538. In Forrester, a former probation officer filed a damage action against a state judge alleging that the judge had demoted and fired her on account of her gender in violation of the Equal Protection Clause of the Fourteenth Amendment.

In determining the scope of judicial immunity, the Court stressed that the focus must be on the function that the immunity protects. *Id.* at 227, 108 S.Ct. 538. Judges are granted absolute immunity for their judicial actions in order to safeguard independent and principled judicial decision making. *Id.* at 226-27, 108 S.Ct. 538. Although a judge's employment decisions "may be essential to the very functioning of the courts," they are not the type of decisions that traditionally have been regarded as judicial acts meriting absolute immunity. *Id.* at 228-29, 108 S.Ct. 538. The Court noted that there was no principled reason for according judges absolute immunity for administrative personnel decisions when executive branch officials are not accorded absolute immunity for their employment decisions. *Id.* at 229-30, 108 S.Ct. 538. The Court found that the danger of judges being deflected from the effective performance of their duties by the threat of suit from disgruntled employees was not great enough to justify the extension of absolute judicial immunity to these situations. *Id.* at 230, 108 S.Ct. 538.

Appellants argue that *Forrester* is distinguishable because a court commissioner, unlike a probation officer, plays an inherent role in the judicial decision making process. Due to the judicial nature of the duties assigned to a court commissioner, appellants argue, the decision to fire a court commissioner is inherently judicial. Appellants, however, can point to no case in which a court evaluated the nature of the services provided by a fired employee to determine whether the decision to terminate was judicial. Moreover, the cases upon which appellants rely for the proposition that some employment decisions

are so closely related to the judicial decision-making process that they are judicial acts do not provide real support for this contention. For example, appellants cite *Cameron v. Seitz*, 38 F.3d 264 (6th Cir.1994), for the proposition that the appointment of certain personnel is an inherent part of the judicial decision-making process. In Seitz, the Sixth Circuit found that a probate judge who refused to consider a probate caseworker's recommendations on the disposition of particular cases, reassigned the employee's cases to other caseworkers, and barred the employee from appearing in his courtroom was absolutely immune from civil liability for claims arising out of this conduct. *Id.* at 270-72. In deciding that the contested actions were judicial, the Sixth Circuit did not focus on the role that the caseworker played in the judicial process. Instead, the court focused on the nature of the challenged actions and found that the actions involved either the disposition of particular cases or control of the judge's courtroom. *Id.* at 271-72. Because both of these actions are inherently judicial in nature, the court ruled that the probate judge was shielded by judicial immunity. *Id.*

Similarly, in *New Alaska Development Corp. v. Guetschow*, 869 F.2d 1298 (9th Cir.1989), upon which appellants also rely, we held that the appointment of a receiver for a particular case was a judicial act. Again, we focused on the fact that the appointment at issue was made in the context of a pending case and in the course of the judge's dealing with the parties in his judicial capacity. *Id.* at 1302. In making the determination that the judge was acting in his judicial capacity, our decision turned on the nature of the judge's action not on the role that the receiver played in the judicial process.

A review of the federal cases describing the ambit of judicial immunity indicates that, in determining whether a particular action is judicial in nature, a court needs to focus on the relationship between the action and the adjudicative process.[2] In *New Alaska*, we identified the following factors as relevant to the determination of whether a particular act is judicial in nature:

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[2] Following are examples of cases in which courts have found a challenged action to be judicial in nature: *Mireles*, 502 U.S. at 12-13, 112 S.Ct. 286 (judge's action of ordering the police to bring an attorney before him was judicial); *Stump*, 435 U.S. at 362-64, 98 S.Ct. 1099 (judge's approval of a mother's ex parte petition to have her "somewhat retarded" daughter sterilized was judicial); *Bradley*, 80 U.S. (13 Wall.) at 354 (disbarring an attorney as a sanction is a judicial action); *Burns v. Reed*, 500 U.S. 478, 492, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991) (issuance of a search warrant is unquestionably a judicial act); *Ireland v. Tunis*, 113 F.3d 1435 (6th Cir.1997) (issuance of an arrest warrant is a judicial act); *Crooks v. Maynard*, 913 F.2d 699 (9th Cir.1990) (a judge's decision to hold two employees in contempt of court is a judicial act).

Following are examples of cases in which courts have found a judge's action to be non-judicial and therefore not protected by judicial immunity: *Richardson v. Koshiba*, 693 F.2d 911 (9th Cir.1982) (act of appointing state judges involves an executive not a judicial act); *Goodwin v. Circuit Court of St. Louis County, Mo.*, 729 F.2d 541 (8th Cir.1984) (decision to remove a hearing officer was an administrative rather than a judicial act); *Guercio v. Brody*, 814 F.2d 1115 (6th Cir.1987) (judge not shielded by judicial immunity for act of firing confidential personal secretary); *McMillan v. Svetanoff*, 793 F.2d 149 (7th Cir.1986) (firing court reporter is not a judicial act); *Harper v. Merckle*, 638 F.2d 848 (5th Cir.1981) (holding a contempt proceeding and ordering plaintiff incarcerated were not judicial acts where controversy that led to incarceration did not center around any matter pending before the judge, but around domestic problems of plaintiff's former wife who worked at the courthouse).

> (1) the precise act is a normal judicial function;
>
> (2) the events occurred in the judge's chambers;
>
> (3) the controversy centered around a case then pending before the judge; and (4) the events at issue arose directly and immediately out of a confrontation with the judge in his or her official capacity.

New Alaska, 869 F.2d at 1302 (citing *Ashelman v. Pope*, 793 F.2d at 1075-76). As the district court correctly noted, consideration of these factors here indicates that the challenged action was not a judicial action. The district court found:

> First, the decision to terminate plaintiff was an administrative decision, rather than a judicial act, because it involved the termination of an employee, and not a decision in a matter pending before the court. Second, although it is unclear whether the vote to terminate plaintiff took place in a judge's chambers, it did not occur while the court was in session. Third, the controversy centered, not on a case, but on plaintiff's efforts to seek the same judicial office as then-Commissioner Wojcik in the April, 1996 election. Finally, according to the allegations of the complaint, the decision to terminate plaintiff was a response to his campaign for judicial office and had nothing to do with plaintiff's performance or decision in a particular case.

Meek, 982 F.Supp. 1410, 1417 (C.D.Cal.1997) (internal citations omitted). The district court did not err in finding that an evaluation of the *New Alaska* factors indicates that it is not essential to insulate judges' employment decisions regarding court commissioners in order to protect

the integrity of the judicial process. Appellants' decision to fire a subordinate judicial employee is an administrative decision; the district court did not err in finding that appellants are not entitled to judicial immunity for such actions.[3]

B. "Absolute Political Immunity" Jurisdiction

Appellants claim that we have jurisdiction to review the district court's order denying their motion to dismiss based on a claim of "absolute political immunity" under the collateral order doctrine. The collateral order doctrine allows an appellate court to hear interlocutory appeals under 28 U.S.C. § 1291 from a "small class [of orders] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). Orders denying a claim of immunity are generally immediately appealable where the immunity guarantees a right not to stand trial. *See, e.g., Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 870-71, 114 S.Ct. 1992, 128 L.Ed.2d 842 (1994); *Alaska v. United States*, 64 F.3d 1352, 1354-55 (9th Cir.1995).

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[3] The district court also found that appellants acted in complete absence of jurisdiction when they fired Meek and that therefore they were not entitled to judicial immunity for this action. Because the decision to fire a subordinate employee is not a judicial act, we do not reach this issue.

The Supreme Court has stressed, however, that the collateral order doctrine is a narrow exception to the general rule "that a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated." *Digital Equipment*, 511 U.S. at 868, 114 S.Ct. 1992. Jurisdiction of this court does not depend upon a party's ability to characterize a right as a "right not to stand trial" as "virtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a 'right not to stand trial.' " *Id.* at 873, 114 S.Ct. 1992. To assess whether we have jurisdiction to review the district court's resolution of this issue under the collateral order doctrine, we focus on the nature of the right asserted by appellants.

Appellants claim that because Meek served in a policy-making position, they have "absolute political immunity" from liability arising out of their decision to fire him for political reasons. They in essence aver that Meek does not have a First Amendment right not to be fired from the position of court commissioner for political reasons and that therefore they can not be held liable for taking such action. Appellants do not explain, however, how Meek's lack of a protected right clothes them with a right not to stand trial. As Meek correctly avers, this claim of political immunity, as presented by appellants, is a right to prevail at trial rather than a right to be free from trial.

Appellants contend that case law establishes that they have a right not to stand trial for claims arising out of their decision to fire a public employee who holds a policy-making position. The cases on which appellants

rely, however, are distinguishable from the present case. For example, neither *Fazio v. San Francisco*, 125 F.3d 1328 (9th Cir.1997), nor *Newman v. Voinovich*, 986 F.2d 159 (6th Cir.1993), involved interlocutory appeals where appellate jurisdiction was premised on the collateral order doctrine; both cases: rather involved appeals from a district court decision to grant a 12(b)(6) motion. In *Fazio*, the district court certified the First Amendment claim for immediate appeal and this court granted Fazio's motion for interlocutory appeal. This court's jurisdiction in the case was therefore under 28 U.S.C. § 1292(b) rather than 28 U.S.C. § 1291. *Fazio*, 125 F.3d at 1330. *Newman* involved an appeal from a final order reviewable pursuant to 28 U.S.C. § 1291 because the challenged district court order dismissed all of plaintiff's claims. *Newman*, 986 F.2d at 160.

Moreover, neither *Fazio* nor *Newman* hold that an official is immune from liability arising out of a decision to fire a policy-making employee. In *Fazio*, we found that a public employee who holds a policy-maker position can be fired for political reasons without offending the Constitution and that we did not need to address the issue of whether the defendants were entitled to "qualified immunity" because there was no First Amendment violation. 125 F.3d at 1334. Similarly, the Sixth Circuit in *Newman* found that the First Amendment did not prevent a governor from considering political affiliations in making judicial appointment because judges are policy-makers. 986 F.2d at 163. Again, the court did not premise its decision on a finding that the governor was immune from liability but rather that the governor's actions did not result in a First Amendment violation.

A natural reading of appellants' claim of absolute political immunity indicates that appellants are claiming a right to succeed at trial rather than a right not to stand trial. Therefore, this claim is a defense the denial of which is not reviewable under the collateral order doctrine. *See e.g., Alaska*, 64 F.3d at 1355-56; *Digital Equipment*, 511 U.S. at 871-77, 114 S.Ct. 1992; *Van Cauwenberghe v. Biard*, 486 U.S. 517, 108 S.Ct. 1945, 100 L.Ed.2d 517 (1988).

AFFIRMED IN PART and DISMISSED IN PART. COSTS TO APPELLEE. CONCURRING OPINION

FERGUSON, Circuit Judge, dissenting:

I dissent from the majority's disposition of this case for one simple reason: Donald Meek was not constructively fired. Therefore, he cannot maintain a § 1983 action in federal district court, and we must dismiss his case.

In § 1983 actions, the preliminary focus must be whether or not the alleged wrongful act involved state action. *Ouzts v. Maryland Nat'l Ins. Co.*, 505 F.2d 547, 550 (1974) (en banc). If it does not, then we as federal courts do not have jurisdiction, see 28 U.S.C. § 1343(a)(3), and we need not even pass on the immunity issues reached in the majority's opinion. In § 1983 claims, we look to state law to determine if there in fact has been state action. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982) ("[T]he deprivation must be caused by the exercise of some right or privilege created by the State."). California law clearly states that a majority of the twenty-one municipal court judges in Riverside are the only people who have the authority to hire and fire court commissioners such as Meek. Cal. Gov't Code § 72192 (providing that the commissioner "shall be

appointed by and hold office at the pleasure of a majority of the judges . . . "). Individual judges may become upset with a commissioner for personal reasons, such as the politics in this case. But the state has decreed that individual judges do not have the right to terminate the commissioners; rather, state action must come from the body of judges as a whole. District Judge Paez was correct in finding that "Judge Walker had no authority to terminate plaintiff solely on his own vote because plaintiff served at the pleasure of a majority of the judges of the municipal courts in Riverside County." *See Meek v. County of Riverside*, 982 F.Supp. 1410, 1418 (C.D.Cal.1997). Without any action here by the entire body of municipal court judges, there is no state action, and we need not even address the immunity issues.

Donald Meek's resignation is not material in this case and cannot form the basis of a constructive discharge claim under § 1983 because no rational juror could conclude that Meek acted reasonably in resigning when only one of the eleven people needed to fire him had acted. *See Watson v. Nationwide Ins. Co.*, 823 F.2d 360, 361 (9th Cir.1987) (requiring resignation to be reasonable in order to prove a constructive firing claim). Meek's unreasonable resignation and lack of understanding of his rights under California law do not create state action or a constitutional tort, and he has no § 1983 claim. I therefore respectfully dissent.

Order of the United States District Court for the Central District of California

Donald L. MEEK, Plaintiff,

v.

COUNTY OF RIVERSIDE; Albert J. Wojcik; and Rodney Walker, Defendants.

No. CV 97-1179RAP(AJWX).

United States District Court,
C.D. California.

Sept. 2, 1997.

George W. Shaeffer, Jr., Irvine, CA, for Plaintiffs.

Timothy T. Coates, Marc J. Poster, Greines Martin Stein & Richland, Beverly Hills, CA, for Defendants.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS

PAEZ, District Judge.

I.

Introduction

Plaintiff Donald L. Meek brings this action against the County of Riverside and Municipal Court Judges Albert J. Wojcik and Rodney Walker alleging that defendants constructively terminated him from his position as a Commissioner of the Riverside Consolidated Superior and Municipal Courts. Plaintiff alleges that he was forced to retire in retaliation for seeking election to the same Municipal Court position as then-Commissioner Wojcik in the April, 1996, judicial elections. Plaintiff seeks relief

under 42 U.S.C. § 1983 for the alleged infringement of his First Amendment right to campaign for public office.

Pending before the Court is defendants' motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim. The County of Riverside contends that it is not responsible for the conduct of municipal court judges because they are state officials, and the defendant judges assert that they are entitled to both judicial and political immunity. Upon consideration of the parties' moving, opposition and reply papers, and the oral arguments of counsel, the motion to dismiss the action against the County of Riverside is properly granted. The individual defendants, however, are not entitled to judicial immunity for the acts alleged in the complaint, and whether the individual defendants are entitled to political immunity cannot be resolved on the record before the Court. Accordingly, defendants' motion to dismiss is granted in part and denied in part.

II.

Factual Background

Plaintiff alleges that he served as a Commissioner of the Riverside Consolidated Superior and Municipal Courts from May, 1989, until defendants allegedly forced him to retire in April, 1996. Plaintiff alleges that he was primarily assigned to the Mt. San Jacinto Judicial District, one of several municipal judicial districts in Riverside County. According to plaintiff, in September, 1995, he learned that Judges Peterson and McCarthy intended to retire in March and April of 1996, respectively, creating two vacancies, including one on the Mt. San Jacinto

Municipal Court. Plaintiff alleges that he approached then-commissioner Wojcik about an arrangement whereby plaintiff would support Wojcik in the April, 1996, non-partisan, election to replace Judge Peterson, and Wojcik would support plaintiff in his effort to obtain an appointment by Governor Wilson to replace Judge McCarthy.

According to plaintiff, it soon became apparent to him that Wojcik would not support him in his effort to obtain a gubernatorial appointment to replace Judge McCarthy. Furthermore, plaintiff allegedly learned that Judge Curtis R. Hinman had written a letter to Governor Wilson supporting Sherrill Nielsen, Judge Walker's friend and associate, to replace Judge McCarthy. Recognizing that he was unlikely to obtain an appointment to replace Judge McCarthy, plaintiff sought election to the judicial position created by Judge Peterson's retirement and, consequently, campaigned against then-Commissioner Wojcik. During the campaign, Judge Walker allegedly stated that plaintiff was his political enemy and that if plaintiff lost the election, Judge Walker would terminate plaintiff from his position as Commissioner.

On April 3, 1996, defendant Wojcik was elected judge of the Mt. San Jacinto Municipal Court. On April 4, 1996, then-commissioner Wojcik, Judge Walker, and Judge Hinman met regarding plaintiff's termination. At that meeting, Wojcik and Judge Walker voted to terminate plaintiff as Commissioner; Judge Hinman abstained. At the time of the vote, defendant Wojcik had not yet taken his oath of office as a municipal court judge.

On April 8, 1996, Judge Hinman allegedly informed plaintiff that he should resign or be fired. Judge Hinman told plaintiff that he could have a hearing before Judge Wojcik and Judge Walker, but that "it would do no good, because the outcome would be the same." Complaint, ¶ 18. According to plaintiff, he elected to retire effective April 8, 1996. Plaintiff alleges that defendants forced him to retire, thereby constructively terminating his employment.

III.

Discussion

A. Standard

A motion to dismiss under Fed.R.Civ.P. 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint. Accordingly, the scope of review on a motion to dismiss for failure to state a claim is limited to the contents of the complaint. *Clegg v. Cult Awareness Network,* 18 F.3d 752, 754 (9th Cir.1994). The court may, however, consider exhibits submitted with the complaint and matters that may be judicially noticed pursuant to Federal Rule of Evidence 201. *Hal Roach Studios v. Richard Feiner & Co.,* 896 F.2d 1542, 1555 n. 19 (9th Cir.1990); *Emrich v. Touche Ross & Co.,* 846 F.2d 1190, 1198 (9th Cir.1988). "[A] document is not 'outside' the complaint if the complaint specifically refers to the document and if its authenticity is not questioned." *Branch v. Tunnell,* 14 F.3d 449, 453 (9th Cir.1994).

Dismissal under Rule 12(b)(6) may be based either on the "lack of a cognizable legal theory" or on "the absence

of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir.1990). The issue on a motion to dismiss for failure to state a claim is not whether the claimant will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims asserted. *Gilligan v. Jamco Development Corp.*, 108 F.3d 246, 249 (9th Cir.1997). When evaluating a Rule 12(b)(6) motion, the court must accept all material allegations in the complaint as true and construe them in the light most favorable to the non-moving party. *Barron v. Reich*, 13 F.3d 1370, 1374 (9th Cir.1994). The court is not required, however, to accept "conclusory legal allegations cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged." *Clegg*, 18 F.3d at 754-55.

Rule 12(b)(6) must be read in conjunction with Rule 8(a), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1356 (1990). The notice pleading standard set forth in Rule 8 establishes "a powerful presumption against rejecting pleadings for failure to state a claim." *Gilligan*, 108 F.3d at 248 (citations omitted). Consequently, a court may not dismiss a complaint for failure to state a claim unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957). In keeping with this liberal pleading standard, the district court should grant the plaintiff leave to amend if the complaint

can possibly be cured by the inclusion of additional factual allegations. *Doe v. United States,* 58 F.3d 494, 497 (9th Cir.1995).

B. Application

1. The County of Riverside Is Not Responsible for the Conduct of Municipal Court Judges

The County of Riverside correctly argues that Judge Walker and then-Commissioner Wojcik were "state officials" at the time of the acts alleged, and that the county cannot be held responsible for their conduct. A municipality may only be held liable under § 1983 for acts "for which the municipality itself is actually responsible, 'that is, acts which the municipality has officially sanctioned or ordered.' " *City of St. Louis v. Praprotnik,* 485 U.S. 112, 123, 108 S.Ct. 915, 924, 99 L.Ed.2d 107 (1988). In addition, only municipal officials with "final policymaking authority" may subject the municipality to § 1983 liability. *Id.* Whether a particular official has such authority is a question of state law. *Id.* Finally, a municipality will only be subject to liability where the alleged violation occurred pursuant to a policy adopted by the officials responsible for making policy in that area. *Id.; see also McMillian v. Monroe County, Alabama,* ___ U.S. ___, ___, 117 S.Ct. 1734, 1736-37, 138 L.Ed.2d 1 (1997) (applying test from *Praprotnik*). In the context of determining whether a municipality was liable for certain acts of a city judicial officer, the Ninth Circuit recently explained that "[t]he crucial factor is whether under state law the acts in question were

performed under the municipality's or the state's authority." *Eggar v. City of Livingston*, 40 F.3d 312, 314 (9th Cir.1994).

Here, the analysis is necessarily somewhat perfunctory because the Ninth Circuit has explicitly held that the California municipal courts are an arm of the state. *See Franceschi v. Schwartz*, 57 F.3d 828, 831 (9th Cir.1995). "It is undisputed that the State Constitution and statutes give the State, not the counties, direction and control over municipal court judges." *Id.* (quoting *County of Sonoma v. Workers' Compensation Appeals Board*, 222 Cal.App.3d 1133, 272 Cal.Rptr. 297 (1990)). Most significantly, it is the state that grants municipal court judges discretion to hire and fire court commissioners. Cal. Gov't.Code §§ 72190, 74135.6.

In sum, "counties have absolutely no influence or control over the manner in which a municipal court judge [or commissioner] performs his or her duties." *County of Sonoma*, 222 Cal.App.3d at 1137, 272 Cal.Rptr. 297. Consequently, defendants' alleged acts could only have been authorized by the State of California, and the County of Riverside cannot be held liable for those acts under § 1983.[1] The motion to dismiss plaintiff's claims against the County of Riverside is, therefore, **GRANTED.**

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[1] Although municipal court judges and commissioners must be treated as state officials, the Eleventh Amendment precludes plaintiff from seeking damages against California or against Judges Walker and Wojcik in their official capacities. "The United States Supreme Court has dictated that, unlike counties and municipalities, state governments, and their arms, officers, and instrumentalities, are generally immune from private lawsuit in federal court by virtue of the Eleventh Amendment to the United States Constitution." *Mumford v.*

2. Judges Walker and Wojcik Are Not Entitled to Judicial Immunity

Judges are absolutely immune from suit under § 1983 with only two exceptions. *Mireles v. Waco*, 502 U.S. 9, 11, 112 S.Ct. 286, 287-88, 116 L.Ed.2d 9 (1991). "First, a judge is not immune from liability for nonjudicial actions, i.e., actions not taken in the judge's judicial capacity. [ ] Second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction." *Id.* at 11-12, 112 S.Ct. at 288 (citations omitted) Here, defendants are not entitled to immunity both because their alleged actions were not taken in their judicial capacities, and because, even if defendants' actions were judicial in nature, they were taken in the complete absence of all jurisdiction.

a. The Acts of Judge Walker and then-Commissioner Wojcik Were Administrative Rather than Judicial in Nature

In evaluating whether a judge's actions are judicial in nature, one must look at "the nature of the function performed – adjudication – rather than the identity of the actor who performed it – a judge." *Forrester v. White*, 484

Basinski, 105 F.3d 264 (6th Cir.1996) (citing *Mt. Healthy Sch. Dist. v. Doyle*, 429 U.S. 274, 280, 97 S.Ct. 568, 572-73, 50 L.Ed.2d 471 (1977), *superseded by statute on other grounds as stated in Rivera v. U.S.*, 924 F.2d 948 (9th Cir.1991)); *see also Franceschi*, 57 F.3d at 831. (9th Cir.1995) ("Given the extensive control exercised by the state over the municipal courts. . . . the municipal court is protected by the Eleventh Amendment")

U.S. 219, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988). Administrative decisions terminating subordinate employees, although "important in providing the necessary conditions of a sound adjudicative system . . . [are] not themselves judicial or adjudicative." *Id.* at 229, 108 S.Ct. at 545. In *Forrester,* a state court judge had hired the plaintiff as a probation officer to prepare presentence reports for adult offender cases and make recommendations for the disposition and placement of juvenile defendants. *Id.* The plaintiff was promoted to a supervisory position but demoted a year later and soon afterwards discharged. *Id.* The plaintiff filed suit alleging sex discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.*

In considering whether the state court judge could assert judicial immunity as a complete defense, the Supreme Court stated that "[a]dministrative decisions, even though they may be essential to the very functioning of the courts, have not . . . been regarded as judicial acts." *Id.* at 228, 108 S.Ct. at 544. Judges' hiring decisions are executive decisions, indistinguishable from "a district attorney hiring or firing assistant district attorneys, or . . . other executive branch official[s] responsible for making such employment decisions. . . . [N]o one suggests that they give rise to absolute immunity from liability in damages under § 1983." *Id.* at 229, 108 S.Ct. at 545.

Federal court decisions subsequent to *Forrester* confirm the general rule that a judge's act in terminating an employee is administrative, rather than judicial, entitling the judge to qualified immunity at best. *See Mireles,* 502 U.S. at 15, 112 S.Ct. at 289-90 (judge immune from suit for

ordering police officers to bring public defender before the judge); *Franceschi v. Schwartz,* 57 F.3d 828 (9th Cir.1994) (judge entitled to judicial immunity because issuance of bench warrants and orders to take violators into custody are judicial acts); *Rosenthal v. Justices of the Supreme Court of California,* 910 F.2d 561 (9th Cir.1990) (judges have absolute immunity in deciding the qualifications of attorneys who will practice in their courts); *McMillan v. Svetanoff,* 793 F.2d 149 (7th Cir.1986) (judge not entitled to judicial immunity for firing court reporter because act did not constitute judicial decision-making); *Cameron v. Seitz,* 38 F.3d 264 (6th Cir.1994) (firing a secretary is an administrative act, while transferring responsibilities from one case worker to another is a judicial act); *Clark v. Campbell,* 514 F.Supp. 1300 (W.D.Ark.1981) (when a judge hires or fires county employees, the judge is not exercising a judicial function). The established rule, therefore, indicates that defendants are not entitled to judicial immunity for their respective roles in plaintiff's allegedly forced retirement.

Nonetheless, defendants offer several arguments in support of their position that they are entitled to judicial immunity. First, defendants rely on the Sixth Circuit's decision in *Seitz,* arguing that they are entitled to judicial immunity because judges perform an inherently judicial function when they exercise control over subordinate judicial officers who participate in the decision-making process. Defendants are correct that a court commissioner can take evidence and make proposed findings on any matter requested by a judge of the municipal court, approve bonds, administer oaths, and take affidavits and depositions. *See* Cal. Civ. Proc. Code § 259; Cal. Gov't

Code § 72190. These duties are judicial in nature and judges properly exercise their judicial authority when assigning these judicial tasks to subordinate judicial officers. *Seitz*, 38 F.3d at 271.

Seitz, however, presented a somewhat different set of facts than those alleged by plaintiff. In *Seitz*, the judge reassigned the plaintiff's cases to another case worker, making a decision about case management rather than deciding whether the case worker should be fired. As the Sixth Circuit explained, "when Seitz transferred [plaintiff's] cases to another case worker, [Seitz] was controlling the proceedings in his courtroom and was therefore entitled to immunity." *Id.* at 272. By contrast, Judge Walker and then-commissioner Wojcik were not involved in any judicial proceedings when they allegedly forced plaintiff to retire. The decision to terminate plaintiff was an administrative decision involving a subordinate employee, not a judicial decision involving resolution or disposition of cases or other legal matters within the jurisdiction of the municipal court.

Second, defendants contend that in order to maintain an independent judiciary, judges' hiring decisions should not be chilled by potential liability arising from employment disputes. The Supreme Court has rejected this argument, concluding that although "there is considerable force in this analysis, . . . it in no way serves to distinguish judges from other public officials who hire and fire subordinates." *Forrester*, 484 U.S. at 229-30, 108 S.Ct. at 545.

Third, defendants rely on *New Alaska Development Corp. v. Guetschow*, 869 F.2d 1298, 1302 (9th Cir.1989),

where the Ninth Circuit held that a judge was entitled to judicial immunity for his appointment of a receiver to oversee business assets in a pending case. Relying on *New Alaska,* defendants argue that the decision to appoint a court commissioner is essentially identical to the decision to appoint a receiver. According to defendants, the only distinction is that a court commissioner may be responsible for certain matters in a number of cases while a receiver oversees such matters in a single case. This argument takes the *New Alaska* holding out of context. The issue in *New Alaska* was whether a judge could be derivatively liable for the actions of the receiver he appointed concerning the disposition of business assets in a marital dissolution action. *Id.* at 1302. The *New Alaska* court found that because the receiver was assisting the court with a matter in a pending case, the appointing judge was entitled to absolute immunity. *Id.* The *New Alaska* court did not consider judicial immunity in the context of an employment decision, and its ruling cannot be applied here.

Nonetheless, the *New Alaska* decision is useful here because the Ninth Circuit identified several factors a court should consider in determining whether particular conduct of a judicial officer is judicial in nature. Those factors include whether: "(1) the precise act is a normal judicial function; (2) the events occurred in the judge's chambers; (3) the controversy centered around a case then pending before the judge; and (4) the events at issue arose directly and immediately after a confrontation with the judge in his or her official capacity." *Id.*

Consideration of the *New Alaska* factors supports the conclusion that the decision to terminate plaintiff was not

a judicial act. First, the decision to terminate plaintiff was an administrative decision, rather than a judicial act, because it involved the termination of an employee, and not a decision in a matter pending before the court. Second, although it is unclear whether the vote to terminate plaintiff took place in a judge's chambers, it did not occur while the court was in session. *See Forrester,* 484 U.S. at 219, 108 S.Ct. at 538-40. Third, the controversy centered, not on a case, but on plaintiff's efforts to seek the same judicial office as then-Commissioner Wojcik in the April, 1996 election. Finally, according to the allegations of the complaint, the decision to terminate plaintiff was a response to his campaign for judicial office and had nothing to do with plaintiff's performance or decision in a particular case. Thus, consideration of the factors identified by the Ninth Circuit in *New Alaska,* also leads to the conclusion that the defendant judges are not entitled to judicial immunity.

Finally, defendants assert that judicial immunity is not limited to case-specific decisions. Defendants point to the fact that judges have absolute immunity in determining the qualifications of attorneys to practice law, a task, according to defendants, that is not too different from hiring and firing court commissioners. *See Rosenthal v. Justices of the Supreme Court of California,* 910 F.2d 561, (9th Cir.1988). Determining the qualifications of attorneys for admission to the bar, however, differs significantly from hiring a subordinate judicial employee. As the Supreme Court stated in *Forrester,* "legislative, rather than judicial immunity, furnish[es] the appropriate standard . . . when promulgating the Bar Code." *Id.* at 228, 108 S.Ct. at 545 (citing *Supreme Court of Virginia v. Consumers Union of*

United States, Inc., 446 U.S. 719, 734-37, 100 S.Ct. 1967, 1975-77, 64 L.Ed.2d 641 (1980)). When judges oversee the qualifications of attorneys, they "[engage] in an act of rule-making [rather than] adjudication." *Id.* at 228, 108 S.Ct. at 545. Hiring or firing court employees is not a rule-making function, and cases dealing with the supervision or qualifications of attorneys are therefore of no help to defendants.

In short, Judge Walker and Judge Wojcik are not entitled to absolute judicial immunity because their alleged actions in voting to terminate plaintiff, thereby allegedly forcing plaintiff to retire, were administrative rather than judicial in nature.

b. Judges Walker and Wojcik Acted in the Complete Absence of Jurisdiction

Because the defendant judges are not entitled to judicial immunity under the first prong of the judicial immunity test, the Court need not consider whether defendants acted in the complete absence of all jurisdiction. Nonetheless, in an abundance of caution, the Court addresses the second prong of the test and finds that the individual defendants acted without jurisdiction to do so when they allegedly voted to terminate plaintiff. *See Mireles*, 502 U.S. at 13-15, 112 S.Ct. at 289.

By allegedly voting to terminate plaintiff on April 4, 1996, nineteen days before then-Commissioner Wojcik took his oath of office as a judge, both defendants acted beyond the scope of their authority. Plaintiff held office at the pleasure of a majority of the judges of Riverside

County. *See* Cal. Gov't Code §§ 72190, 74135.6. Consequently, then–Commissioner Wojcik lacked authority to vote to terminate plaintiff because he was not yet officially a municipal court judge at the time of the vote. Likewise, Judge Walker had no authority to terminate plaintiff solely on his own vote because plaintiff served at the pleasure of a majority of the judges of the municipal courts in Riverside County.

In *Mireles*, the Supreme Court explained that by allegedly ordering police officers to bring a public defender before him, Judge Mireles acted in excess of his authority. *Id.* That act was not in excess of Judge Mireles' jurisdiction, however, because it was "taken in the very aid of the judge's jurisdiction over a matter before him[.]" *Id.* By contrast, Judges Walker and Wojcik's alleged actions in voting to terminate plaintiff were not taken in aid of their jurisdiction over matters pending before them. Because the individual defendants' alleged actions were outside the scope of their authority, and because those actions were not taken in aid of their jurisdiction in matters pending before them, defendants alleged actions were taken in the complete absence of jurisdiction.[2]

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[2] Defendants contend that they did not act without jurisdiction when they voted to terminate plaintiff because plaintiff elected to retire. Plaintiff alleges, however, that Judge Hinman informed him of the vote and told him that he could appear before the same judges for a hearing, but that "it would not make any difference because the outcome would be the same." Complaint, ¶ 19. Taking the alleged facts as true, plaintiff could reasonably have believed that he would be fired if he did not retire. *See Watson v. Nationwide Ins. Co.*, 823 F.2d 360, 361 (9th Cir.1987) (action for constructive termination is based upon reasonable perceptions of plaintiff, not intent of defendants).

Accordingly, Judges Walker and Wojcik are not entitled to absolute judicial immunity.

3. Political Immunity

Judge Walker and Judge Wojcik's assertion that they are entitled to political immunity raises issues concerning First Amendment protection of both political affiliation and free speech. In *O'Hare v. City of Northlake*, 518 U.S. 712, 116 S.Ct. 2353, 135 L.Ed.2d 874 (1996), the Supreme Court reiterated the separate tests for protection of political affiliation and free speech, but noted that both tests will typically require case-by-case analysis in order to determine the reasonableness of the government action. Id. at ___ - ___, 116 S.Ct. at 2357-58.

Where a government employer has allegedly terminated a public employee on the basis of the employee's political affiliation, "the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Id.* at ___, 116 S.Ct. at 2357 (quoting *Branti v. Finkel*, 445 U.S. 507, 518, 100 S.Ct. 1287, 1294-95, 63 L.Ed.2d 574 (1980)); *see also Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976).

On the other hand, where an employer takes adverse action against a public employee in response to the employee's exercise of his or her right of free speech, the controlling cases "call for a different, though related inquiry," and courts apply the balancing test from *Pickering v. Board of Ed. Of Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). Under *Pickering*, the court must strike a balance "between

the interests of the [employee], as a citizen, in commenting upon matters of public concern, and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, at 568, 88 S.Ct. at 1734-35; *see also Board of County Commissioners v. Umbehr*, 518 U.S. 668, ___, 116 S.Ct. 2342, 2347, 135 L.Ed.2d 843 (1996) (reaffirming *Pickering* test). The threshold question under *Pickering* is "whether the speech [in question] may be fairly characterized as constituting speech on a matter of public concern." *Thomas*, 881 F.2d at 830 (quoting *Connick v. Myers*, 461 U.S. 138, 146, 103 S.Ct. 1684, 1689-90, 75 L.Ed.2d 708 (1983)).

In applying the *Pickering* balancing test, a court must consider:

> whether the speech (i) impairs discipline or control by superiors, (ii) disrupts co-worker relations, (iii) erodes a close working relationship premised on personal loyalty and confidentiality, (iv) interferes with the speaker's performance of her or his duties, or (v) obstructs the routine operation of the office.

Hyland v. Wonder, 972 F.2d 1129, 1139 (9th Cir.1992). However, "when employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices." *Id.* at 1137; *see also Weisbuch v. County of Los Angeles et al.*, 119 F.3d 778 (9th Cir.1997) (First Amendment protects employee speech on matters of public concern, but does not protect speech that only concerns internal office affairs) Furthermore, the employee must prove that the

speech in question was not only "constitutionally protected," but that "it was a substantial or motivating factor in the termination." *Umbehr*, 518 U.S. at ___, 116 S.Ct. at 2347.

After explaining the two tests concerning public employees' First Amendment rights to political affiliation and free speech, respectively, the Supreme Court went on to explain in *O'Hare* that "where specific instances of the employee's speech or expression, which require balancing in the *Pickering* context, are intermixed with a political affiliation requirement," it is inappropriate to apply the "raw test of political affiliation," and "the balancing *Pickering* mandates will be inevitable." *Id.* at ___, 116 S.Ct. at 2358.

The Ninth Circuit implicitly reached the same conclusion in *Thomas v. Carpenter*, 881 F.2d 828 (9th Cir.1989). There, the plaintiff, a sheriff's lieutenant, brought a civil rights action against the Sheriff after the Sheriff banned him from attending departmental staff meetings and policy review sessions because he had challenged the Sheriff in a non-partisan election. *Id.* at 829. Applying the *Pickering* test for protection of free speech, the Ninth Circuit explained that *Elrod* and *Branti*, "were not directly on point because they address political patronage dismissals based upon party loyalty. The election between Thomas and Carpenter, however, was nonpartisan." *Thomas*, 881 F.2d at 831. The *Thomas* court did note, however, that "the government interest requirement in the affiliation cases is also relevant in the employee speech cases." *Id.* Here, as in *Thomas*, the election between then-Commissioner Wojcik and plaintiff was non-partisan and apparently concerned office loyalty rather than political loyalty.

Defendants point to several decisions holding that political loyalty in the generic sense, like political party affiliation, "is a valid justification for political patronage dismissals." *Green v. Henley,* 924 F.2d 185, 187 (10th Cir.1991); *see also Soelter v. King County,* 931 F.Supp. 741, 746 (E.D.Wash.1996). In other words, "[p]olitical affiliation refers to commonality of political purpose and support, not solely political party membership." *Green,* 924 F.2d at 187 (citing *Williams v. City of River Rouge,* 909 F.2d 151, 153 n. 4 (6th Cir.1990)). In both *Green* and *Soelter,* the courts applied the "raw test" of political affiliation. The Supreme Court's decision in *O'Hare* clarifies, however, that where a public employee's right to free speech or expression is at issue, application of the pure political affiliation test is inappropriate. Moreover, the Ninth Circuit explicitly held in *Thomas* that the *Pickering* balancing test applies where a government employer has allegedly taken adverse action against a public employee in response to the employee's unsuccessful campaign in a non-partisan election. *Thomas,* 881 F.2d at 830. Accordingly, although *Green* and *Soelter* are useful for purposes of assessing the nature of the government's interest in non-partisan, political loyalty, this Court is bound to apply the hybrid *Pickering* test described in *O'Hare* and *Thomas.*

As in *Green* and *Soelter,* the Sixth Circuit in *Mumford v. Basinski,* 105 F.3d 264 (6th Cir.1997), recently applied the pure political affiliation test where a government employer allegedly violated a public employee's First Amendment rights by terminating him on the basis of political loyalty. In *Mumford,* however, the issues of political-party affiliation and non-partisan, political loyalty

were intertwined. Mumford, a member of the Democratic Party, served as a referee for the domestic relations court in Ohio. *Mumford*, 105 F.3d at 266. In 1988, the plaintiff helped the incumbent judge, a Democrat, with his reelection bid against a Republican challenger, the defendant. *Id.* at 266. Upon winning the election, the defendant wrote plaintiff a letter stating that plaintiff's employment with the court would be terminated when defendant took office. *Id.*

Applying a modified version of the *Branti* test, the Sixth Circuit sought to determine "whether the hiring authority [could] demonstrate that party affiliation [was] an appropriate requirement for the effective performance of the public office involved." *Id.* at 270. The court concluded that the duties of a court referee are inherently political in character because they "entail a relationship of confidence" between the court referee and the judges whom the referee serves. *Id.* at 272. Accordingly, the court found the position of court referee fell into three of four categories of public occupations characterized as "political" and, therefore, was subject to patronage consideration under First Amendment jurisprudence. Despite the clear involvement of political-party politics in the elections in the Ohio court system, the court did not explain the role of party politics in its analysis.

Although Mumford is factually similar to the instant case in many respects, the decision there is not in keeping with the framework established in *O'Hare* and *Thomas*, and this Court is bound to follow Supreme Court and Ninth Circuit precedent. Accordingly, the Court must apply the *Pickering* balancing test, as modified in *O'Hare*, rather than the pure political affiliation test set forth in

the *Elrod* and *Branti* line of cases. Extrapolating from *O'Hare*, where "specific instances of the employee's speech and expressions are intermixed with a political affiliation requirement," the *Pickering* balancing test applies and the inquiry is not limited to whether affiliation, or loyalty is "an appropriate requirement for the effective performance of the public office involved." *O'Hare*, 518 U.S. at ___ - ___, 116 S.Ct. at 2357-58.

Having explained the proper test to apply to determine whether Judge Walker and Judge Wojcik are entitled to political immunity, the Court concludes that it lacks sufficient factual information to determine, on the limited record before it, whether the government's interest in court efficiency and non-partisan, political loyalty outweighs plaintiff's First Amendment rights. *See Thomas*, 881 F.2d at 831-32 (whether Thomas was in position to thwart goals of in-party and impede "effective implementation of general departmental policy," could not be determined on motion to dismiss); *Weisbuch*, 119 F.3d 778, ("Because factual development is often necessary before the *Pickering* factors can be applied, balancing typically cannot be performed on a 12(b)(6) motion.").

IV.

Conclusion

For the foregoing reasons the County of Riverside's motion to dismiss is **GRANTED**. Judge Walker and Judge Wojcik's motion to dismiss on the basis of absolute judicial immunity is **DENIED**. Judge Walker and Judge

Wojcik's motion to dismiss on grounds of political immunity is **DENIED** without prejudice to defendants' right to raise the issue on a motion for summary judgment.

IT IS SO ORDERED.

Statutes Involved

California Constitution, article VI, section 22:

The Legislature may provide for the appointment by trial courts of record of officers such as commissioners to perform subordinate judicial duties.

California Code of Civil Procedure section 259:

Subject to the supervision of the court, every court commissioner shall have power to do all of the following:

(a) Hear and determine ex parte motions for orders and alternative writs and writs of habeas corpus in the superior court for which the court commissioner is appointed.

(b) Take proof and make and report findings thereon as to any matter of fact upon which information is required by the court. Any party to any contested proceeding may except to the report and the subsequent order of the court made thereon within five days after written notice of the court's action. A copy of the exceptions shall be filed and served upon opposing party or counsel within the five days. The party may argue any exceptions before the court on giving notice of motion for that purpose within 10 days from entry thereof. After a hearing before the court on the exceptions, the court may sustain, or set aside, or modify its order.

(c) Take and approve any bonds and undertakings in actions or proceedings, and determine objections to the bonds and undertakings.

(d) Administer oaths and affirmations, and take affidavits and depositions in any action or proceeding in any of the courts of this state, or in any matter or proceeding whatever, and take acknowledgments and proof of deeds, mortgages, and other instruments requiring proof or acknowledgment for any purpose under the laws of this or any other state or country.

(e) Act as temporary judge when otherwise qualified so to act and when appointed for that purpose, or by written consent of an appearing party. While acting as temporary judge the commissioner shall receive no compensation therefor other than compensation as commissioner.

(f) Hear and report findings and conclusions to the court for approval, rejection, or change, all preliminary matters including motions or petitions for the custody and support of children, the allowance of temporary spousal support, costs and attorneys' fees, and issues of fact in contempt proceedings in proceedings for support, dissolution of marriage, nullity of marriage, or legal separation.

(g) Hear actions to establish paternity and to establish or enforce child and spousal support pursuant to subdivision (a) of Section 4251 of the Family Code.

(h) Hear, report on, and determine all uncontested actions and proceedings subject to the requirements of subdivision (e).

(i) Charge and collect the same fees for the performance of official acts as are allowed by law to notaries public in this state for like services. This subdivision does not

apply to any services of the commissioner, the compensation for which is expressly fixed by law. The fees so collected shall be paid to the treasurer of the county, for deposit in the general fund of the county.

(j) Provide an official seal, upon which must be engraved the words "Court Commissioner" and the name of the county, or city and county, in which the commissioner resides.

(k) Authenticate with the official seal the commissioner's official acts.

California Government Code section 72190:

Within the jurisdiction of the court and under the direction of the judges, commissioners of municipal courts shall exercise all the powers and perform all of the duties authorized by law to be performed by commissioners of superior courts and such additional powers and duties as may be prescribed by law. At the direction of the judges, commissioners may have the same jurisdiction and exercise the same powers and duties as the judges of the court with respect to any infraction or small claims action. The commissioners of municipal courts shall possess the same qualifications the law requires of a judge and shall hold office during the pleasure of the court appointing them and shall not engage in the private practice of law. They shall be ex officio deputy clerks.

Notwithstanding any other provision of law, a commissioner of a municipal court or a justice court of any

judicial district in this state who has been duly appointed and has thereafter been retired for service, or a commissioner of a superior court in this state who has been duly appointed and has thereafter been retired from service, may be assigned by the presiding judge or sole judge of a municipal court to serve as a court commissioner of the court for any periods of time as he or she is needed for the prompt and efficient discharge of the business of that court. While serving, he or she shall be paid the full compensation of a court commissioner, payable as follows: he or she shall continue to receive his or her retirement allowance, and in addition the county shall pay him or her the amount equal to the difference between the retirement allowance and full compensation. That employment shall not operate to reinstate him or her as a member of the county retirement system or to terminate or suspend his or her retirement rights or allowance, and no deductions shall be made from his or her compensation as contributions to the retirement system.

California Government Code section 72190.1:

A commissioner of a municipal court may conduct arraignment proceedings in the court if directed to perform those duties by the presiding or sole judge of the court, including the issuance and signing of bench warrants.

California Government Code section 72190.2:

If directed to perform such duties by the presiding judge or sole judge of the court, a commissioner of the municipal court may issue and sign a bench warrant for the arrest of a defendant who fails to appear in court when required to appear by law or who fails to perform any act required by court order.

California Government Code section 72192:

Whenever the appointment of a commissioner or jury commissioner is authorized by law, he shall be appointed by and hold office at the pleasure of a majority of the judges or the judge senior in service when there is an equal division of the judges. He shall be a member of any retirement system which includes municipal court attaches.